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Supreme Court of the United States

October Term, 1951.

No. 319

MRS. BEULAH FISHER LEJEUNE, Individually and as Tutrix for her Minor Children,

Petitioner,

versus

EXCESS INSURANCE COMPANY OF AMERICA,

Respondent,

BRIEF ON BEHALF OF EXCESS INSURANCE COMPANY OF AMERICA, RESPONDENT.

MOSES C. SCHARFF,
H. L. HAMMETT,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

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EXCESS INSURANCE COMPANY OF AMERICA,
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BRIEF ON BEHALF OF EXCESS INSURANCE COMPANY OF AMERICA, RESPONDENT.

MAY IT PLEASE THE COURT:

REASONS WHY WRIT SHOULD NOT BE GRANTED.

No questions are presented by this case which would warrant a review by your Honors, because:

(1) No important questions of general or local law were decided by the Court below; the decision embraces only questions of statutory construction of state process statutes.

BLEED THRU

(2) The Court below did not even question the validity of any state statutes; it conceded such validity, though it decided one state statute had been repealed.

(3) The only pertinent state Court decision was not disregarded, but was exactly followed.

STATEMENT OF FACTS.

This suit was a direct action against insurers in the Federal Court for the Western District of Louisiana. As such, it was governed by Section 1391, paragraph (c) Title 28 U. S. C., which reads as follows:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Since respondent was a New York corporation and was not licensed to do business in Louisiana, and since it was stipulated that respondent had no office or agent in Louisiana and that there was no person authorized to accept service on its behalf in that state, petitioner had recourse to two Louisiana statutes under the provisions of Rule 4 of the Rules of Civil Procedure and particularly paragraph 7* thereof. The

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* Paragraph 7 reads: "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in any action brought in the courts of general jurisdiction of the state.

first statute (Act 159 of 1940) prescribed service as to insurers "transacting business" in Louisiana. However this Act was held in the Louisiana case of *White vs. Indiana Travelers Assurance Co.*, 22 So. (2nd) 137, as being not applicable to an insurance company which had merely issued a policy to a Louisiana resident because, as the Court held, the mere issuance of a policy was not the transaction of business and the Act required the "transacting of business" in order to render service under it proper. The Louisiana court, however, pointed out that there was another Act; namely, 105 of 1898 under which the mere issuance of a policy was sufficient to subject the insurance company to service upon the Secretary of State. When this case was called to the attention of the District Court in the argument on motions to dismiss, petitioner's counsel moved to have service made under the specific provisions of this second Act (105 of 1898.*) While the Act of 1898 did require an insurance company which issues policies, to appoint the Secretary of State as agent for services of process, it did not provide any method of service and hence the General Service Act (179 of 1918) which authorized service upon the Secretary of State where a corporation required by law "to appoint and *maintain* an agent for service of process has failed to do so", was additionally invoked.

* The motion read in part, "Excess was required by Section 1 of Article II of Act 105 of 1898, to appoint 'in writing, the Secretary of State to be the true and the lawful attorney * * * upon whom all lawful process' might be served upon it in any action or proceeding against it and since Excess has failed to appoint the Secretary of State as its agent for service of process as required by said statute, the method of service of process upon it in this suit is provided by subdivision (c) of paragraph (6) of Section 1 of Act 179 of 1918, etc." The Act of 1898 referred to in this motion was the repealed Act.

ARGUMENT.

When the second service was attempted under specific provisions of the Act of 1898, the Act had already been repealed and no equivalent legislation, as the Court of Appeals decided, had been enacted. On the contrary, the substituted statute (Louisiana Insurance Code, Act 195 of 1948, Section 27.03) used the identical language of the Act of 1940 which *White vs. Indiana Travelers* had held required the transacting of business in this state as well as the mere issuance of a policy. A strenuous effort was made in the Court of Appeal to show that regardless of the fact that, as petitioner admitted, the substituted statute used the identical language of the Act of 1940 which the Louisiana Court had held required the transaction of business, the new Act did not in fact mean what it plainly said and that the new Act should be interpreted contrary to the interpretation placed upon the same wording by *White vs. Indiana Travelers.* This question of course is one of statutory construction solely. Petitioner so admitted in her application for a rehearing. Furthermore, the only positive complaint against the decision of the Court of Appeal was that this question of statutory construction was wrongfully decided. Almost the entire application was taken up with a discussion of this question. The application contained such expressions as "in the problem of original construction which this case presents to you", "the problem of construction which your Honors have before you." Far from claiming that the Louisiana case had not been followed by the Court as the pre-

sent application for certiorari contends, the application for rehearing contained such expressions as "new and original construction by your Honors in this case" and "a rehearing should be granted so that your Honors can construe par. (a) of Section 27.03 of Act 195 of 1948 which has never been previously interpreted by a Louisiana Court."

STATE DECISION FOLLOWED.

It is true that the Court of Appeal brushed aside somewhat abruptly, plaintiff's extended arguments on this question of statutory construction. But the Court had no other alternative as if it had taken any other course, it would have committed obvious error in not following *White vs. Indiana Travelers.*

As the Court below stated:

> "This is because, for the reasons given in White vs. Indiana, supra, the statutes relied on in the first attempt at service did not authorize such process against a foreign corporation in the situation of Excess, merely because it issued a policy in New York and delivered it to a broker in Louisiana. It is because, too, for the reason put forward by Excess, the statute specifically invoked by plaintiff as authority for the second attempt at service, was not then in existence but had been repealed, and no equivalent statute had been reenacted to take its place.

The Court was of course bound to follow *White vs. Indiana* in holding that the mere issuance of a policy in New York and its delivery to a broker in Louisiana did not constitute the doing of business in the latter state. This is the law of the case and must be respected by your Honors as well. It should be added that the Supreme Court has never decided nor even intimated that such a single and isolated act in interstate commerce could constitute the doing of business in a state.

As to the second question, it is not disputed that Act 105 of 1898 was repealed before the service, which was specifically made under it, was accomplished.

The third question as to whether the new statute which was enacted in substitution for Act 105 of 1898 was equivalent to the repealed statute is the real question in the case and the only question which engaged the principal attention of court and counsel in the Court of Appeal. It is submitted that this question was properly decided, but in any event it is a question of statutory construction which does not justify the issuance of a writ.

VALIDITY OF STATE STATUTES ASSUMED.

The Court of Appeal did not attack or even question, the validity of any Louisiana Statute. On the contrary; it assumed such validity, for the opinion stated:

> "Turning to the invoked statutes, we think that, assuming their validity as against attack upon ground of denial of due process, appellee can take no comfort from reliance on them."

Plaintiff's application for rehearing admitted that the decision below did not go further than the questions of statutory construction. It said "we are constrained to believe that your Honors did not pass on the jurisdictional question" and again "since your Honors did not hold that there would have been no jurisdiction over the person of Excess if the invoked statutes had been available to paintiff".

QUESTIONS OF JURISDICTION NOT PRESENTED.

Hence questions of jurisdiction are not presented by this case and can not arise until all of the conclusions of the appellate court on the questions of statutory construction are first reversed by your Honors. It is respectfully submitted that your Honors should not grant a writ in order *primarily* to review a decision involving only statutory construction, though if the question of jurisdiction were actually presented, counsel is certain your Honors would hold that the mailing from New York of a signed and completed insurance contract to assured's broker in Louisiana and nothing more was not a minimum contact so as to justify suit in a state court under an appropriate service statute, much less the doing of business so as to justify process in a federal court under Section 1391 when an appropriate process statute was lacking. At least until Louisiana plainly attempts to make sufficient the mere issuance of a policy; until it unmistakably drops its added requirement of "transacting of busi-

ness" no process can be served in a situation such as this in a federal court.

It is noted that Paragraph (3) of petitioner's specification of errors attempts to claim that respondent was "doing business in Louisiana". This assertion is directly contrary to the only Louisiana case on the subject; namely, *White vs. Indiana Travelers* and of course the Court below could not have found that the mere mailing of the policy from New York was the doing of business in the face of this state court holding to the contrary.

It should be stressed that the stipulation to which petitioner consented and which appears on page 22 of the transcript admits that there were no other ties or contacts except the issuance of a policy and the mailing of it from New York to the broker in Louisiana. It should be added that the policy, as distinguished from the usual liability policy which requires the insurance company to defend suits, did not require Excess to defend or to do anything whatever at any time in Louisiana. It was, as its name implies and as the policy contract plainly states, an "excess" contract supplementing the conventional liability policy written by Employer's Liability Assurance Corporation, the other defendant. Excess was responsible to the insured alone, for the ultimate net loss only, which the insured incurred, after the prior payment of the loss by the insured, and after the primary policy had been exhausted. It is even open to question, though the point was not pressed be-

low, whether the Louisiana Direct Action statute, permitted such a suit against a mere excess carrier under a policy such as this. In addition, if there was any general public policy of the state which made it desirable that a resident could sue an insurer (though a suit was filed on the same cause of action and is now pending in the state court directly against the public utility, the insured), it was fully satisfied by the action against Employer's Liability Assurance Corporation.

PETITIONER ADMITS PROCESS STATUTES MUST EXIST.

On page 28 of her brief petitioner admits that jurisdiction must not only exist but *process* must be supported by applicable state statutes. The statutes invoked by petitioner were found not applicable by the Court of Appeal, the first because the Louisiana Appellate Court decided it did not apply, the second because it was repealed and the third because its language was the same as the first which the Louisiana Court had held was not applicable. This admission convincingly proves that this case concerns only the construction of state statutes and not questions of jurisdiction.

REPEAL OF THE PROCESS STATUTE ACT, ACT 105 OF 1898.

Petitioner does not cite any case which holds that despite its repeal Act 105 of 1898 could be used, *eo nomine*, as specific authority for the second service. No case has been cited, because none exists, to the effect that service can be made under a repealed statute. The case of *The Fair Ltd. vs. American Fire Insurance Company*, 135 La. 48, 64 So. 977, merely held that once a company had duly appointed the Secretary of State as its agent for the service of process such appointment continued (despite insolvency at the company's domicile) as long as a policy or liability remained outstanding (as the statute plainly provided). The case did not concern or mention a situation where the company had *not* given the Secretary of State its power of attorney. Nor did it touch on the effect of the repeal of the statute upon an unqualified company such as Excess in our case. Liwwise the case of *White vs. Indiana Travelers* did not consider what would be the effect of a repeal of the statute under which, it suggested, process could be served as the statute was still in force at the time of this decision.

But this again is a question of statutory construction. It is not suggested that petitioner has been deprived of any rights by the repeal since we are considering only the existence and applicability of state statutes in aid of process under paragraph (7) of Rule 4. No such claim could have been made in view of *Missouri Pac. R. Co. vs. Clarendon Boat Oar Co.*, 257 US 533, 42 Sup. Ct. 210, which held "Provisions for

making foreign corporations subject to service in the state is a matter of legislative discretion and a failure to provide for such service is not a denial of due process." The other claimed errors set forth in paragraphs 5 and 6 again present only questions of statutory construction. Section 21.05 of Act 195 of 1948 is clearly not applicable. It will be seen by Section 21.01, of the same act that the words "foreign insurers" refer to such companies as had qualified for the purpose of transacting business within the state. This section is in nowise equivalent to the repealed Act which sought to make the mere issuance of a policy equivalent to an appointment of an agent for service of process.

The claimed error Number 6 (page 6 of application) makes necessary a repeated reference to *White vs. Indiana Travelers* since the cited statute requires the transaction of business and the Louisiana case, as has been many times stated above, decided that the mere issuance of a policy was not the transacting of business. This Louisiana decision is the law of our case and cannot be disregarded and a contrary interpretation substituted.

Over and beyond the necessity for following on the question of statutory construction, as did the Court of Appeal, the Louisiana appellate decision above referred to, we have the comforting certainty that the Court of Appeal was correct in so construing the new act. In the first place its language was identical with

the old law construed in the Louisiana decision. In the second place only the strongest possible considerations would authorize a court to substitute "or" for "and" in the statute, which petitioner admits is necessary and argues must be done, if process in this case is to be sustaned.

In the third place there is a following section of the same statute which conclusively demolishes petitioner's argument both as to the proper construction of the section (27.03 of Act 195 of 1948) upon which she relies and also as to the public policy of Louisiana. Reference to Section 27.05 of the same act shows that the Legislature never intended an insurer to be sued if it merely issued a policy. For paragraph "C" of this section reads:

> C. Nothing in sub-section a of this section is to be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Sub-sections b or c of Sec. 27.03 on the ground **EITHER** (1) that no policy or contract of insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business therein OR (2) *that such insurer has not been transacting business in this State* or (3) that the person on whom the Service was made pursuant to sub-section c of Section 27.03 was not doing any of the acts therein enumerated (Emphasis supplied).

We find therefore that the Legislature has itself construed the section in question and has itself

enunciated the public policy of Louisiana as to suits against such insurers and that the decision below is in accord with the legislative construction and public policy of this State as well as with the only pertinent Louisiana decision.

Finally, it may be conceded that perhaps it is desirable that this Court should some day reach and decide the question as to whether the mailing of one policy over a state line and nothing more renders an insurer suable by an injured third party in a Federal Court under a direct action statute of the State of the policy's destination. Certainly none of the previous decisions of this Court would authorize such suit. Emphatically this Court has never held that such mailing alone constitutes the doing of business in a State. *Travelers Health v. Virginia*, 339 U. S. 643, is certainly not authority for such holding since it was a regulatory suit by a State and your Honors found other ties and contracts beyond the mere mailing of a policy.

But in the present case, such issue did not arise. The Court of Appeal assumed for the purpose of its decision that jurisdiction existed but found that the process statutes, which petitioner admits must exist, were lacking and that the invoked statutes either had been repealed or did not authorize the process.

CONCLUSION.

It is therefore respectfully submitted that since only questions of statutory construction are involved in this case which questions were rightly decided and since the only pertinent State decision was followed and finally since no important questions of general or local law were involved, that, under such circumstances, no reasons exist for granting a writ.

Respectfully submitted,

MOSES C. SCHARFF,
H. L. HAMMETT,
Counsel for Respondent.

CERTIFICATE.

This is to certify that copies of this brief have been served on Edward Dubuisson, Counsel for Petitioner on this ..... day of October, 1951.

.....
Counsel for respondent.

CORRECTED COPY p. 9.

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Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HER APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EDWARD DUBUISSON,
Counsel for Petitioner.

JOHN M. WISDOM,
JAMES G. DUBUISSON,
Of Counsel.

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JURISDICTION OVER DEFENDANT'S PERSON.

MAY IT PLEASE THE COURT:

In view of the fact that respondent's principal argument under its motion to dismiss in the trial court and in the court below was that the court had no jurisdiction over its person because it was not doing business in the state and, therefore, for the court to assume jurisdiction over it would violate the due process clause of the fourteenth amendment to the United States Constitution, it is suprising to see respondent concede in its brief in opposition that the court below did not pass on the ques-

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tion of jurisdiction. If this be true then, indeed, the question of jurisdiction may not be before this court because the action of the trial judge in overruling the motion to dismiss for lack of jurisdiction has never been reversed. However, we don't know how this court will interpret the ill-considered opinion of the court below which left wholly unconsidered an important issue in the case, so on the question of jurisdiction we wish to call attention to a most interesting decision which we ran across, after the petition was filed here, in the Southern Reporter Advance Sheets of September 20, 1951, where it was carried as one of the nationally interesting cases under "Judicial Highlights". We refer to the case of *Smyth v. Twin State Improvement Corporation*, Vt. 80 A. 2d 664 (May 1, 1951).

In that case the Supreme Court of Vermont upheld process against a foreign corporation in a suit against it in a Vermont court for damages resulting from a tort allegedly committed by the defendant in Vermont. Service of process was made under a Vermont statute providing that if a foreign corporation commits a tort in Vermont against a Vermont resident such act shall be deemed to be doing business in Vermont by such foreign corporation and be the equivalent of the appointment of the secretary of state as its agent for service of process. There as here, the process was attacked as being in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

In reaching its conclusion that the process was not unconstitutional the reasoning of the court and the authorities cited corresponds remarkably to the argument and the supporting authorities which petitioner made in her

original brief in support of her petition here. The opinion thoroughly analyzes this court's opinions in *International Shoe Company v. Washington*, 326 U. S. 310, (1945), *Travelers Health Association v. Virginia*, 339 U. S. 643 (1950) and *Hess v. Pawloski*, 274 U. S. 352 (1927), and it cited among other cases *Storey v. United Insurance Company*, 64 Fed. Supp. 896 (1946).[1] In support of its considered opinion that the question before it has not been decided by this court, which question we contend is fundamentally the same as the first federal question here presented to Your Honors, the Vermont Supreme Court said:

> "We are of the opinion that the United States Supreme Court has left undecided whether isolated tortious activity could result in a proper subjection of a foreign corporation to suit in the forum when the cause of action arose out of that activity; no generally applicable standards can be ascertained from the decisions beyond the statements in the International Shoe case, supra. Anno. 94 L. Ed. 1181. The American Law Institute indicates that the issue is open as of 1948. Restatement of the Law of Judgments sec. 23 and caveat thereto; Restatement of the Law of Conflict of Laws, 1948 Supplement, sec. 88. * * *"

In concluding its opinion the court, after stating that numerous authorities on which the defendant relied were readily distinguishable, said:

> "They all precede in time the International Shoe decision which marked **a change in the judicial climate.**"

[1] Cited in petitioner's original brief, n. 41, pg. 28.

That decision, we believe, buttresses our contention that the federal questions presented in the petition for review in this case, and particularly the first question, are of general importance, are open and call loudly for decision by this court.

THE DECISION BY THE COURT BELOW OF AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH APPLICABLE LOCAL DECISIONS IS GROUND FOR CERTIORARI.

In conceding that the court below had failed to reverse the action of the trial judge in overruling its motion to dismiss for want of jurisdiction over its person, respondent was apparently acting in the belief that if no federal question was presented here Your Honors could not feel justified in granting certiorari. In doing that, however, it misunderstood the rules and the practice of this court. As an illustration of the reasons that will prompt this court to review a decision of a Circuit Court of Appeals Your Honors put ahead of the presentation of a federal question the situation where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions * * *."[2]

A good example of the application in practice of that rule by this court is found in *Cities Service Oil Company v. Dunlap et al.*, 308 U. S. 208 (1939). The first sentence of the opinion of the court begins thus:

> "This cause is here in order that we may decide whether the Circuit Court of Appeals wrongly declined to follow the rule of the Texas Courts * * *."

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[2] Revised Rules of the Supreme Court of the United States, Rule 38, 5 (b).

And near the close of the opinion it is said:

> "* * * Petitioner was entitled to the protection afforded by the local rule * * *."

As pointed out in petitioner's original brief this court has recently and repeatedly noted the vast public importance of the transaction of insurance business, including, of course, the sale of policies across state lines, and the important question of local law which the court below decided in conflict with applicable local decisions was that there was available to petitioner in this suit, and to all other citizens of Louisiana, no statute providing for substituted service of process on an unlicensed foreign insurer which sells and delivers an insurance policy in Louisiana to a Louisiana citizen covering a Louisiana risk. The applicable local decisions with which the decision of the court below is in obvious conflict are *White v. Indiana Travelers Assurance Company*, 22 So. 2d 137 (1945), and *The Flair, Ltd. v. American Fire Insurance Company*, 135 La. 48, 64 So. 977 (1914).

SERVICE OF PROCESS UNDER ACT 179 OF 1918, SEC. 1, SUBDIV. (6), PAR. (c).

In its brief in opposition respondent repeatedly states that service of process was made under Act 105 of 1898, and that the service was invalid because the 1898 Act had been repealed when service was made in May, 1949. **This is a patent mis-statement of fact.** Act 105 of 1898, Art. 2, Sec. 1, which was not repealed until October 1, 1948, and was therefore in effect when the policy in suit was sold and delivered in Louisiana on June 10, 1946, and

when decedent was electrocuted on September 20, 1947, required respondent to appoint the secretary of state as agent for service of process before issuing the policy sued on, but it did not provide a method for service of process. It was not a process statute and no service was possible under its provisions. The process statute which was in effect at all times pertinent hereto, and which is still in effect as Louisiana Revised Statutes of 1950, Title 13, Sec. 3471, (5), (c), was Act 179 of 1918, generally known as the Service of Process Act, and is the statute under which the service of process was expressly made. This is clearly shown by petitioner's motion for an order of court appointing the secretary of state as agent for service of process in compliance with the requirements of that statute, **in which motion** the provision of the statute under which service was being made was **quoted in full** (R. 31-34). The compliance with the other requirements of that statute for service is shown (R. 40, 41) by the certificate of the assistant secretary of state upon whom service was made.

The reason why the procedure for service provided by **Act 179 of 1918, Sec. 1, Subdiv. (6), par. (c)** was available to petitioner against respondent is because respondent **was a foreign corporation which was required by Act 105 of 1898, Art. II, Sec. 1,** to appoint the secretary of state as its agent for service of process when the policy was sold and delivered to the assured in Louisiana on June 10, 1946, and the statute further provided that the secretary of state should continue to be respondent's process agent as long as the policy remained outstanding against respondent in Louisiana. The policy, of course, was still outstanding

when process was served on respondent under Act 179 of 1918.

Under the plain holding of the court in the *White* case if service of process had been made in this case under Act 179 of 1918 before the 1898 Act was repealed on October 1, 1948, the service would have been valid and neither the court below nor respondent has ever given any reason why the repeal of the 1898 act after this suit was filed, made service of process under Act 179 of 1918 unavailable to petitioner in May, 1949, in view of the fact that respondent was a foreign corporation which was required by Act 105 of 1898 to appoint an agent for service of process in Louisiana when the policy was delivered and had not done so. It is submitted that no good reason can be given and that the holding in the *Flair, Ltd.* case *supra,* is squarely opposed to the theory that the repeal could have had such a consequence.

SEC. 21.05 OF ACT 195 OF 1948 AS AN EQUIVALENT OF SEC. 1 OF ART. II OF ACT 105 OF 1898.

Petitioner contends that if it could be held that the repeal of Act 105 of 1898 defeated petitioner's right to service of process under Act 179 of 1918, that sec. 21.05 of Act 195 of 1948, which repealed Act 105 of 1898, required respondent as a foreign insurer to appoint the secretary of state as its agent for service of process and, consequently, made the process procedure of Act 179 of 1918 available to her. Neither respondent nor the court below ever gave any reason why that contention is not correct. Indeed, although that argument was pressed upon the court below

by petitioner, that tribunal did not deign even to mention or refer, indirectly, remotely or by implication to that statutory provision. We have only that court's *ipse dixit* to the effect that Act 105 of 1898 "was not then in existence but had been repealed, and no equivalent statute had been re-enacted to take its place." That *ex cathedra* pronouncement is hardly convincing and there is respectable authority for a different conclusion.

Since petitioner's original brief in support of her application for certiorari was written, Vol. 15 of West's Louisiana Revised Statutes, which are currently in process of completion, has been published. The Louisiana Revised Statutes of 1950 were prepared by the Louisiana Law Institute, a statutory body of prominent judges, lawyers and law professors, and they were prepared for publication by the Institute through arrangement with West Publishing Company. The work has been generally hailed as a scholarly and skillful model of statutory revision. In Vol. 15 L. R. S., Sec. 985, we find the re-enactment of Sec. 21.05 of Act 195 of 1948 with an annotation giving the "History and Source of Law", under which there is a sub-division, "Prior Laws", immediately under which Sec. 1 of Art. II of Act 105 of 1898 is quoted in full. The obvious fact that Sec. 21.05 of Act 195 of 1948 was an equivalent of Sec. 1 of Art. II of Act 105 of 1898 seems to have been clearly recognized by the editorial staff of the publishers of Louisiana Revised Statutes Annotated which would indicate that perhaps the court below was not justified in disregarding completely an important statute which had been pressed upon it for consideration.

THE ACTION BY THE TRIAL JUDGE IN OVERRULING RESPONDENT'S MOTION TO DISMISS IS ENTITLED TO GREAT WEIGHT.

In considering the questions of Louisiana Law which are presented by petitioner's application for review it is, we think, important to remember that the trial judge below who overruled defendant's motion to dismiss on all grounds was an eminent Louisiana lawyer who, before his appointment to the bench, had for some years held the highest legal office in the state, that of attorney general, while none of the members of the three judge court which reversed him, except Judge Wayne G. Borah, was a Louisiana lawyer or has any special knowledge of Louisiana law.

In *Gardner, Trustee v. New Jersey*, 329 U. S. 565 (1947), this court said at page 575:

> "• • • That construction of New Jersey law made by a federal judge of the New Jersey district court is entitled to special weight. • • •"

And in *Steele v. General Mills, Inc.*, 329 U. S. 433 (1947), this court said at page 438:

> "• • • We cannot say that the District Court sitting in Texas erred in holding that no part of the claim was barred by Art. 5526. • • •"

And at page 439 the court said further:

> "• • • Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas Federal Judge. • • •"

Petitioner and her children have been victimized by the denial to them by the appellate court below of the benefit of Louisiana statutes and jurisprudence which had been recognized and accorded to them by the trial judge below who is learned in Louisiana law.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of this Brief have been served on opposing counsel on this 30th day of October, 1951.

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